2003 BOARD OF SUPERVISORS CORRESPONDENCE
DOCUMENTS FOR COUNTY COUNSEL WEBSITE

DATE	SUBJECT	AUTHOR	FORTNER/ MAIN	WEBSITE YES/NO
12/05/03	Retirement Litigation Tentative Decision	Hal Melom	RGF: 12/8/03	Yes

COUNTY OF LOS ANGELES
OFFICE OF THE COUNTY COUNSEL
648 KENNETH HAHN HALL OF ADMINISTRATION
500 WEST TEMPLE STREET
LOS ANGELES, CALIFORNIA 90012-2713

TDD
(213) 633-0901
TELEPHONE
(213) 974-1904
TELECOPIER
(213) 687-7300

LLOYD W. PELLMAN
County Counsel

December 5, 2003

TO: SUPERVISOR DON KNABE, Chairman
SUPERVISOR GLORIA MOLINA
SUPERVISOR YVONNE BRATHWAITE BURKE
SUPERVISOR ZEV YAROSLAVSKY
SUPERVISOR MICHAEL D. ANTONOVICH

FROM: LLOYD W. PELLMAN
County Counsel

RE: **Retirement Litigation Tentative Decisions**

We have received two tentative decisions from the Superior Court in San Francisco relating to coordinated retirement cases affecting this County.

In *Los Angeles County Fire Department Association of Chiefs, et al. v. Board of Retirement* the Court rejected plaintiffs' claim that the "cap" imposed by your Board in 1995 on pensionable flexible benefit earnings deprived unrepresented employees of a vested right. The County's potential exposure in this case, if decided against the County, was estimated at approximately $250,000,000.

In *Cecil Bugh v. Board of Retirement* the Court rejected plaintiffs' claim that retirees whose final compensation was calculated in whole or in part prior to January 1, 1991, were entitled to include as pensionable earnings those amounts that such members could have received in cash in lieu of flexible earnings. The Court, however, concluded that amounts actually taken as cash in the three years prior to January 1, 1991, should be included, and has directed that the pensions of affected retirees be recalculated accordingly. The County's potential exposure in this case, if decided against the County, was estimated at approximately $65,000,000. The Court's decision reduces that liability to approximately $12,000,000.

Copies of the Court's tentative decisions are attached, and will become final this month unless the Court finds that revisions are necessary.

The County is represented in these cases by Elwood Lui and Scott Bertzyk of Jones Day. If you have any questions, please contact Principal Deputy Halvor S. Melom at (213) 974-1821.

LWP:HSM:mv

Enclosures

c: David E. Janssen
Chief Administrative Officer

Violet Varona-Lukens, Executive Officer
Board of Supervisors

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

Coordinated Proceeding Special Title (Rule 1550(b)) RETIREMENT CASES	Judicial Council Coordination Proceedings No. 4049 L.A.S.C. Case No. BS 057432
LOS ANGELES COUNTY FIRE DEPARTMENT ASSOCIATION OF CHIEFS, et al. Petitioner, v. BOARD OF RETIREMENT, LOS ANGELES COUNTY EMPLOYEES' RETIREMENT ASSOCIATION; COUNTY OF LOS ANGELES Respondents.	Tentative Decision

This petition for a writ of mandate came on for hearing on November 17, 2003. All parties were represented by counsel of record. The sole issue for determination is whether the Los Angeles County Employees' Retirement Association ("LACERA") improperly restricted the pensionability of contributions made by the County of Los Angeles to flexible benefit plans of unrepresented employees by including in compensation and compensation earnable as defined by the County Employees Retirement Law of 1937, Government Code section 31450 *et. seq.*

("CERL"),[1] only the portion of the contribution that the employee had the option of receiving in cash.

The parties have stipulated that in 1991, LACERA staff began including in compensation earnable employer contributions to employee flexible benefit plans. On September 11, 1992, the LACERA Board of Trustees ("the board") ratified the staff policy. (Stipulated Facts ¶ 13) The minutes from the board meeting read, "A second motion was made . . . to ratify the policy, implemented through LACERA staff, that effective on and after January 1, 1991, the programs known as The Flexible Benefit Plan, Choices, Mega Flex, and Options constitute compensation earnable within the meaning of Government Code section 31461. The motion passed unanimously." (Stipulated Facts, Ex. 34, p. 19.) At that time, employer contributions to the Flex and Mega Flex plans, to which the petitioners belong, were entirely cashable. (Stipulated Facts, ¶¶ 4, 5; Ex. 8) However, employer contributions to the Choices and Options plans, to which organized employees belong, were cashable only in part. (Stipulated Facts, ¶¶ 9, 10; Ex. 52, attachment 3, p. 2) The policy ratified by the board was to include in compensation earnable the entire amount of the contributions to the Flex and MegaFlex plans, but to include only the cashable portion of the contributions to the Choices and Options plans. (Stipulated Facts, ¶¶ 13, 14) Effective January 1, 1995, Los Angeles County amended the Flex and MegaFlex plans by limiting the amount of the contribution that the employee could receive in cash. (Stipulated Facts, ¶ 15) As a result of that change, the members were advised that the pensionable portion of

[1] Section 31460 of CERL provides in relevant part, " 'Compensation' means the remuneration paid in cash out of county or district funds, plus any amount deducted from a member's wages for participation in a deferred compensation plan . . ., but does not include the monetary value of board, lodging, fuel, laundry, or other advantages furnished to a member." Section 31461 of CERL provides in relevant part, " 'Compensation earnable' by a member means the average compensation as determined by the board, for the period under consideration upon the basis of the average number of days ordinarily worked by persons in the same grade or class of positions during the period, and at the same rate of pay."

the employer's contribution would also be limited to the amount of the contribution that the employee may receive in cash. (Stipulated Facts, Ex. 8, p. 1)

Petitioners contend that the latter restriction impaired a vested right of the members to have the full amount of employer contributions made to their flexible benefit plans included in compensation earnable. Alternatively, petitioners argue that the board is estopped to deny their claims based on promises contained in literature given to plan members between 1991 and 1994 explaining the pensionability of such contributions. Respondents disagree. This court having read and considered the parties' briefs and the stipulated facts and evidence, finds and concludes that petitioners did not have a vested right to the inclusion of the entire employer contribution in pension calculations, and further, that the board is not estopped to deny petitioners' claims. It is therefore unnecessary to consider respondents' further contention that petitioners' claims are barred by the statute of limitations.

It is well established that "upon acceptance of public employment [one] acquire[s] a vested right to a pension based upon the system then in effect." (*Miller v. State of California* (1977) 18 Cal.3d 808, 814.) Such pension rights are "obligations protected by the contract clause of the federal and state Constitution." (*Ibid.*) 'The constitutional prohibition against contract impairment does not exact a rigid literal fulfillment; rather it demands that contracts be enforced according to their just and reasonable purport." (*Allen v. Board of Administration* (1983) 34 Cal.3d 114, 119-120.) "The impairment provision does not prevent laws which restrict a party to the gains reasonably to be expected from the contract." (*Ibid.*)

Here, we assume that petitioners had the right to insist that the board continue to calculate their pensions in the manner that was approved in September 1992, or at least in a substantially equivalent manner. However, petitioners acknowledge that the County maintained the ability to

alter the terms of its flexible benefit plans, as it did to place a cap on the portion of the contributions that the employee could receive in cash. Since the policy of the board to include in compensation earnable the entire amount of the contributions into the Flex and MegaFlex plans had been adopted when the entire amount was cashable, one must conclude at a minimum that the board had not adopted a policy to include contributions that were not cashable. Since members of the Flex and MegaFlex plans in 1992 received no contributions to their plans that were not cashable, they acquired no vested right to have any such contributions they might receive in future years treated in a manner not otherwise compelled by statute (and, as indicated in other decisions of this court in the consolidated Retirement Cases, the inclusion of flexible benefits was not mandatory, but was within the discretion of the retirement board). Moreover, there is merit to the respondents' further argument that the record from 1992 indicates that the policy which the board approved at that time was a single policy applicable to all four of the County's flexible benefit plans, and that the policy was to include in pensionable income only contributions that could be taken in cash by the employee. This understanding is reflected in the opinions of counsel that the board received before adopting the policy (Stipulated Facts, Ex 50, pp. 15-17; Ex. 51, pp. 11-15; Ex 52, pp. 8, 43, attachment 3, p. 2-3), the discussion reflected in the board minutes (Stipulated Facts, Ex. 34, p. 5), the exclusion from compensation earnable of noncashable contributions made to the Choices and Options flex plans (Stipulated Facts ¶¶ 9-14), as well as in opinion letters circulated when the 1994 changes were under consideration. (Stipulated Facts, Ex. 42, pp. 3-4; Ex. 43, pp. 8-10). Accordingly, petitioners' argument that they acquired a vested right to have noncashable contributions to their flexible benefit plans included in their pensionable income must be rejected.

The initial misinterpretation of former section 31460.1[2] by the County, as requiring the inclusion in compensation earnable of contributions to flexible benefit plans, does not demonstrate that when the board approved staff policy in 1992, the board or plan members were still under this impression. This misinterpretation was corrected by the Legislature in May 1992, before the LACERA board acted in September 1992. (1992 Senate Bill No. 193 § 3.)

Finally, there is no reason to conclude that the county is estopped from denying petitioners' claims. The evidence demonstrates that at least two attorneys who considered the issue at that time and advised the parties on issues relating to the pensionability of these contributions to flex benefit plans believed that the pensionability of the contributions turned on the employees' ability to receive the benefit in cash. (See e.g. Stipulated Facts, Ex. 45, p. 8-9; Ex. 52, p. 43, attachment 3, p. 2-3) Although petitioners assert that it was reasonable for plan members to believe otherwise, the evidence they have submitted does not support that assertion. The literature supplied to plan members explaining the pensionability of employer contributions states only that "Your County Contribution is added to your gross earnings for purposes of calculating your retirement contribution and benefits. That means your retirement benefit will be calculated with a higher amount than simply an average of your gross earnings." (Stipulated Facts, Ex. 6, p. 5.) Just prior to that statement, however, is an explanation of the plan, including the statement that "If the benefits you chose cost less than the County Contribution, you receive the difference in additional pay." (*Ibid.*) Based on this explanation, which was fully accurate when given, members were not reasonably led to believe, and could not reasonably have

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[2] Former section 31460.1 read, " 'Compensation' shall not include employer payments, including cash payments made to, or on behalf of, their employees who have elected to participate in a flexible benefits program, where those payments reflect amounts that exceeds their employees' salaries. [¶] This section shall not be operative in any county until the time the board of supervisors shall, by resolution adopted by a majority vote, makes this section applicable to their county."

assumed, that if at some future date portions of the employer contribution to their flex plan became non-cashable, the non-cashable component also would be included in the pension calculations. There is no basis to fault respondents for having failed to qualify the explanation in the employee literature by discussing how hypothetical future contributions to their flex plans would be treated for pension purposes.

Accordingly, the petition for a writ of mandate is denied.

Pursuant to California Rules of Court, Rule 232(d), this Tentative Decision will be the Statement of Decision unless, within twenty (20) days of the date hereof, any party specifies controverted issues or makes proposals not covered in this Tentative Decision.

IT IS SO ORDERED.

Dated: November 24, 2003.

STUART R. POLLAK
Judge of the Superior Court

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

Coordinated Proceeding Special Title (Rule 1550(b)) RETIREMENT CASES	Judicial Council Coordination Proceedings No. 4049
Cecil E. Bugh, individually and on behalf of all others similarly situated, Petitioner, v. Los Angeles County Employees Retirement Association, et al., Respondents.	L.A.S.C. Case No. BS055611 Tentative Decision
Los Angeles County Employees Retirement Association, Cross Complainant, v. Cecil E. Bugh, Cross Defendant.	

This petition for a writ of mandate came on for hearing on October 20, 2003. All parties were represented by counsel of record. The sole issue for determination is whether the members

of the petitioner class are entitled to retroactive inclusion in compensation and compensation earnable as defined by the County Employees Retirement Law of 1937, Government Code section 31450 *et. seq.* ("CERL")[1], of all cashable employer contributions made to their flexible benefit plans prior to 1991, and to the corresponding recalculation of pension benefits owing to pre-1991 retirees.[2]

The parties have stipulated that prior to 1991, the cashable portion of employer contributions to flexible benefit plans was not included in compensation earnable. In 1991, staff of the Los Angeles County Retirement Association ("LACERA") began including cashable flex benefits in compensation earnable. (Stipulated Fact C.) On September 11, 1992, the LACERA Board of Trustees ("the board") reviewed the actions taken by its staff with respect to the pensionability of flexible health benefits. (Stipulated Facts, ex C.) In anticipation of the meeting, the board obtained legal opinions from three law firms. (Stipulated Facts, ex. C, p. 2.) The consensus at the meeting was that the inclusion of the cashable contributions was discretionary. (Stipulated Facts, ex. C, p. 16.) At the conclusion of the meeting, the board ratified the staff policy, effective January 1, 1991. (Stipulated Fact D; Stipulated Facts, ex. C., p. 18.) In 1993, the board revisited whether to apply this policy retroactively to benefits received

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[1] Section 31460 of CERL provides in relevant part, " 'Compensation' means the remuneration paid in cash out of county or district funds, plus any amount deducted from a member's wages for participation in a deferred compensation plan . . ., but does not include the monetary value of board, lodging, fuel, laundry, or other advantages furnished to a member." Section 31461 of CERL provides in relevant part, " 'Compensation earnable' by a member means the average compensation as determined by the board, for the period under consideration upon the basis of the average number of days ordinarily worked by persons in the same grade or class of positions during the period, and at the same rate of pay."

[2] The judgment entered in the consolidated cases on November 30, 2001 states that the following issue remains to be decided in this case: "whether amounts received or receivable in cash by members from their flexible benefit plan prior to January 1, 1991 must be included in compensation, and if otherwise appropriate, in compensation earnable, and or final compensation." (Judgment, [¶] I.A.4.)

prior to 1991, and reaffirmed its decision not to do so. (Stipulated Facts, Ex. D, p. 29-30.) Again the board obtained advice of counsel, who opined that the decision fell within the discretion of the board. (Wyatt Letter, Appendix to Stipulated Facts, D.1.)

This court having read and considered the parties' briefs and the stipulated facts and evidence finds and concludes as set forth herein.

1. *The board improperly excluded from compensation earnable employer cash payments made to plan members in lieu of flexible health benefits prior to 1991.*

At the hearing on October 20, an issue arose regarding whether the benefits at issue in this case include benefits that had been taken in cash by some members, or merely benefits that were cashable but not received in cash. Supplemental briefing was requested, and has been received and considered by the court. Based on the language of the November 30, 2001 judgment reserving certain issues for future decision ("whether amounts *received* or receivable in cash by members from their flexible benefit plan prior to January 1, 1991 . . ."), it appears that the includability of both cashed and cashable benefits is properly before this court for decision. Nonetheless, as the includability of cash payments received in lieu of flexible benefits was explicitly decided in the earlier proceedings, it is not necessary to revisit the issue at this time. This court's Statement of Decision Re: Includability of Insurance-Related Payments, filed on July 20, 2000, held that "under the plain language of the statute the payments received in lieu of health services are remuneration paid in cash. As such, the payments fall within the definition of compensation. [¶] . . . Accordingly, they must be included in compensation and where appropriate in compensation earnable and final compensation." (pp. 9-10.) The subsequent appellate decision in *In re Retirement Cases* (2003) 110 Cal.App.4th 426 did not reject this conclusion. The decision of the Court of Appeal did not address this portion of the underlying ruling, but held, consistent with this court's decision, that county contributions into members'

flexible benefit plans used to pay insurance premiums to third parties are not required to be included in compensation. (*Id.* at pp. 56, 62.) The appellate court's statement that "the Legislature expressed its intent that it *never* considered inclusion of flexible benefits to be mandatory under CERL" is not inconsistent with this court's ruling. "It is elementary that the language used in any opinion is to be understood in the light of the facts and the issue then before the court. [Citation.] Further, cases are not authority for propositions not considered." (*McDowell & Craig v. City of Santa Fe Springs* (1960) 54 Cal.2d 33, 38.) Moreover, where the plain language of the statute is unambiguous, as it is here, it is both unnecessary and inappropriate to consider the legislative history. (*J.A. Jones Construction Co. v. Superior Court* (1994) 27 Cal.App.4th 1568, 1575.) Accordingly, for the reasons set out in the July 20, 2000 Statement of Decision (pp. 9-11), the prior ruling that cash payments received by members in lieu of flexible health benefits are mandatory elements of compensation is hereby reaffirmed.

In *County of Marin Association of Firefighters v. Marin County Employees Retirement Association* (1994) 30 Cal.App.4th 1638 (*Marin County Firefighters*), the court held that a retirement board does not have discretion to include in compensation earnable only prospectively an element that the statute mandates be included. The court agreed with the trial court that, "Given Retirement Association's 'conce[ssion] that holiday pay is *mandatorily* includable' as an element of final compensation, . . . section 31461 did not give the Board discretion to include holiday pay only prospectively." (*Id.* at p. 1645.) The court reasoned that "nothing in the statute or in [*Guelfi v. Marin County Employees' Retirement Assn.* (1983) 145 Cal.App.3d 297] gives the Board, having determined that an element of compensation meets the statutory definition of '"[c]ompensation earnable"' for a particular year, the discretion to exclude that element in calculating benefits based on the retiree's compensation for that year." (*Id.* at p. 1646.)

Accordingly, LACERA did not have the discretion to refuse to recalculate petitioners' pensions based upon the inclusion in compensation and compensation earnable of these additional cash benefits.[3]

2. *The board did not abuse its discretion by including cashable, but not cashed, payments to flexible benefit plans in compensation earnable on a prospective basis only.*

Petitioners acknowledge that under CERL the inclusion in compensation of cashable employer contributions not taken in cash by the plan members is discretionary. (See *In re Retirement Cases, supra,* 110 Cal.App.4th at p. 478.) Nonetheless, petitioners contend that once the board exercised its discretion to include such benefits prospectively, it was required to do so retroactively for all its members. Alternatively, petitioners contend that to the extent the board had discretion to include the benefit retroactively, it abused its discretion by refusing to do so. Respondents disagree.

We agree with respondents that it was within the board's discretion to include these benefits in compensation earnable on a prospective basis only. (See Government Code section 31461 [Compensation earnable "means the average compensation *as determined by the board,* for the period under consideration upon the basis of the average number of days ordinarily worked by persons in the same grade or class of positions during the period, and at the same rate of pay."].) Because inclusion of the benefit is not mandatory, petitioners' reliance on *Marin County Firefighters, supra,* 30 Cal.App.4th 1638, is misplaced. That case held that a retirement

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[3] In addition, we reject respondent's argument that petitioners' claims are barred by the statute of limitations. This action seeks to recover improperly calculated periodic pension payments. It is not an action to determine the right to a pension. Thus, it is not barred by the statute of limitations. (*Dillon v. Board of Pension Com'rs of City of Los Angeles* (1941) 18 Cal.2d 427, 430.) While petitioners could have filed suit in 1993, after the board rejected their request for recalculation of their pensions, such a suit was not required to preserve their right to recover later accruing benefits. (*Abbott v. City of Los Angeles* (1958) 50 Cal.2d 438, 463-464.)

board could not refuse to include in compensation earnable for prior years a benefit that the statute required it to include in those years. It did not hold that when a retirement board decides to include a benefit in the calculation of compensation earnable which the statute does not require it to include, the board must make the inclusion retroactively if it is to do so at all. Petitioners have cited no authority that supports the proposition that once a retirement board exercises its discretion to include a benefit, it must do so retroactively for all retired members. Moreover, there is no reason to believe that the Legislature intended to constrain the board's discretion in this respect. Such a rule would discourage retirement boards from ever exercising their discretion to add new non-mandatory elements to the calculation of pensionable income.

Finally, petitioners have not established that the board abused its discretion by refusing to include the benefit retroactively. This court reviews the board's decision to determine whether the board exercised its discretion in an arbitrary and capricious manner. (*Strumsky v. San Diego County Employees retirement Assn.* (1974) 11 Cal.3d 28, 34, fn. 2.) Here, the board's decision, reached upon the advise of counsel, was reasonable in light of the increased costs of retroactively including the benefit, both administratively and in increased pension payments, and the burden of potential arrears contributions on 9,000 retired members when only 1,400 retired members might benefit. The board's decision was well reasoned and rational.

Petitioners' arguments to the contrary are not persuasive. First, contrary to petitioners' assertion, the evidence fully supports the board's claim that it was exercising its discretion when it decided to include the benefits in question only prospectively. While the board's staff initially began including the benefits after passage of Government Code section 31460.1 under the mistaken belief that the section mandated such inclusion, that section was repealed in May 1992, when the Legislature made clear that it had not intended to make the inclusion of these benefits

mandatory. (1992 Senate Bill No. 193 § 3.) The board did not address the issue or ratify its staff's actions until September 1992, after it had been correctly advised by counsel that the inclusion of these benefits was discretionary. Moreover, even if the board mistakenly thought inclusion was mandatory, as just indicated, inclusion was not in fact mandated by the statute, which is the controlling consideration.

The board's decision does not violate the equal protection clause based on the potential for different treatment between pre- and post-1991 retirees. (*Hudson v. Board of Administration, supra,* 59 Cal.App.4th 1310, 1328.) In *Hudson*, the court noted, " 'In cases where a classification burdens neither a suspect group nor a fundamental interest, "courts are quite reluctant to overturn governmental action on the ground that it denies equal protection of the laws," ' " and only a rational basis must be shown to uphold the classification. [Citations.] . . . Courts generally have applied a rational basis test in evaluating equal protection claims based on differing treatment of members of public employee retirement plans. [Citations.]" (59 Cal.App.4th at p. 1328.) Petitioners have not identified a suspect classification or a fundamental interest that is improperly burdened by the board's decision to include the benefits prospectively only, and the board's fiscal and administrative concerns provide a rational basis for the decision.

Accordingly, the petition for writ of mandate is granted to direct the board to recalculate petitioners' compensation and compensation earnable for years prior to 1991 by including therein employer contributions to their flexible benefit plans received by the member in cash and, if otherwise appropriate, to recalculate the member's final compensation and to pay petitioners any unpaid pension benefits that may thus be determined to be owing within the three year limitations period agreed to by the parties, plus interest at the legal rate from the date on which each respective payment became due, and in all other respects the petition is denied.

Pursuant to California Rules of Court, Rule 232(d), this Tentative Decision will be the Statement of Decision unless, within twenty (20) days of the date hereof, any party specifies controverted issues or makes proposals not covered in this Tentative Decision.

IT IS SO ORDERED.

Dated: November 24, 2003.

STUART R. POLLAK
Judge of the Superior Court